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Royal Commission on
Aboriginal Peoples



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les peuples autochtones

Government
Publications



THE RIGHT
OF ABORIGINAL
SELF-GOVERNMENT
AND THE
CONSTITUTION:
A Commentary

**The symbolism of the logo
of the
Royal Commission on Aboriginal Peoples**

The figures joining hands are derived from an Iroquois wampum belt. Its design is altered into circular fashion but still maintains its symbol of unity. These figures are identified as elders, men, women, children of future generations and representatives and participants from different tribes, races, societies, or groups meeting for a common purpose.

With the white design between the figures and the circle, the overall image lends itself to the shape of the Sun Mask of the west coast Indians. Among the peoples of the Arctic, the subject of the sun and its welcomed light to the land was an inspiration to portray the dawning of a new day, or of a rekindled relationship.

The circle is common to Aboriginal peoples as a symbol of Earth, as well as being representative of wholeness, harmony, and life as a continuous journey.

The bear paw, in most if not all Aboriginal peoples' cultures, symbolizes a healing energy. The bear's prominence is also essential in the Medicine Wheel and is considered to bestow this healing energy. According to Ojibway custom, a woman in their Sweat Lodge ceremonies represents that position. It is this healing energy that contributes to the process of unity and strength with people, and in turn brings harmony and understanding towards a concern.

*Joseph Sagutch
Toronto, Ontario
January, 1992*

The Right of Aboriginal Self-Government and the Constitution:

**A Commentary
by the
Royal Commission
on Aboriginal Peoples**



February 13, 1992
Ottawa

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Preface

The Royal Commission on Aboriginal Peoples submits the following thoughts on the current constitutional proposals as they relate to Aboriginal self-government. We hope to promote a common understanding of the key concepts involved.

The debate surrounding specific proposals relating to Aboriginal peoples bears directly upon our mandate. An impasse could develop and in turn impair the Commission's ability to fulfil its mandate effectively.

We set out six criteria which should be satisfied in any constitutional provision dealing with the right of Aboriginal self-government and then provide some examples of ways for accommodating that right in Canada's Constitution.

We hope only to smooth the path to further exchanges between the parties, not to usurp their right place at the negotiation table. We urge all parties to seize this moment and recreate the spirit of co-existence and reciprocity that characterized early relations between Aboriginal peoples and incoming settlers.

This commentary is designed to help inform the public, and to promote a better understanding of the central issues in this debate. We hope that it will encourage the exploration of alternative avenues to Constitutional consensus.

René Dussault, j.c.a.
Co-chair

Georges Erasmus
Co-chair

Introduction

◆ In this commentary, we offer some thoughts on the current constitutional proposal as they relate to the right of Aboriginal self-government. We do so only after serious reflection and in order to promote a better understanding of Aboriginal self-government and the Constitution.


The Royal Commission's Terms of Reference direct it to consider the subject of Aboriginal self-government and to recommend methods of recognizing and affirming it. They also contemplate the intervention of the Royal Commission in the constitutional reform process if it thinks such intervention would be useful.¹ Thus, the Government of Canada's proposals contained in the publication *Shaping Canada's Future Together*,² and the debate surrounding the specific proposals relating to Aboriginal peoples, bear directly upon the Royal Commission's mandate (see Appendix).

For reasons that will become clear, we believe that without common understanding of the key concepts involved, an impasse could develop that would block the explicit recognition of the right of the Aboriginal self-government in the Constitution and, in turn, impair the Commission's ability to fulfil its mandate effectively. This commentary is designed to help inform the public and to encourage the exploration of alternative avenues to Constitutional consensus.

The first part of the document traces the development of a potential impasse. We begin with an examination of the context of the current debate, and its evolution since Aboriginal rights were recognized in the Constitution in 1982. The second part considers how such an impasse might be avoided. We conclude with some thoughts on building a new relationship between Aboriginal peoples and Canadians in general.

1.

Toward an Impasse?

 Aboriginal rights were embodied in the written Constitution in 1982, following intense negotiations that had begun five years earlier. Three sections of the *Constitution Act, 1982* related directly to Aboriginal peoples – Sections 25, 35 and 37.

Section 25 was designed to protect the special rights of Aboriginal peoples from any adverse effects flowing from the *Canadian Charter of Rights and Freedoms*. It provided that the Charter would not abrogate or derogate from “any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada”, including those recognized by the Royal Proclamation of October 7, 1763, or acquired in land claims settlements.

Section 35, by contrast, embodied a positive constitutional guarantee. It stated:

- (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “Aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.

Section 37 provided for the convening of a First Ministers’ Conference on Aboriginal Constitutional Matters by April 17, 1983, involving Aboriginal peoples’ representatives and delegates from the two Territorial

governments. Among other things, it mandated the “identification and definition of the rights of those peoples to be included in the Constitution of Canada.”

That Conference was held in March of 1983, and an accord was reached among the parties that led to the first amendments to the newly patriated Constitution. Section 25 was clarified so as to protect future as well as existing land claims settlements. Section 35 was also changed to indicate that “treaty rights” included rights under existing and future land claims agreements, and to guarantee Aboriginal and treaty rights equally to male and female persons. Section 35.1 was added, calling for the convening of a First Ministers’ Conference, to include representatives of the Aboriginal peoples of Canada, before any constitutional amendments directly affecting Aboriginal peoples could be enacted. Under the new Section 37.1, at least two further First Ministers’ Conferences had to be called before 1987 (with a third added in 1984 by way of political agreement).

The three First Ministers’ Conferences that followed focused on the right of Aboriginal self-government, and set the agenda for Aboriginal constitutional matters which remains with us today. The debate centred upon the question of whether the right of

Aboriginal self-government flowed from inherent and unextinguished Aboriginal sovereignty, from existing treaty rights, or from the Federal and Provincial governments by way of constitutional amendment. The Federal government took the "contingent right" approach, which required the content of self-government to be defined by agreement among Federal and Provincial governments prior to any entrenchment in the Constitution. The approach was unacceptable to Aboriginal peoples' representatives because it presupposed that the right was to be created by the Constitution. The reaction of Provincial and Territorial governments was mixed, and negotiations ended without agreement. Just prior to the adjournment of the 1987 Conference, the four national Aboriginal peoples' organizations tabled a draft constitutional amendment that would recognize and affirm the inherent right of self-government of all Indian, Inuit and Metis peoples of Canada.³

The Federal government's constitutional proposals of September 1991, entitled *Shaping Canada's Future Together*, moved away from the contingent right approach proposed in 1987. The new proposals suggest:

... an amendment to the Constitution to entrench a general justiciable right to Aboriginal self-government in order to recognize Aboriginal peoples' autonomy over their own affairs within the Canadian federation.⁴

The right would become enforceable in the courts in ten years, or before that time if negotiations on content and scope could be successfully concluded.

Due to the ambiguous language of the document, it is difficult to determine whether the Government of Canada is now proposing to **recognize an already-existing, inherent** right of self-government in the Constitution or whether it is proposing to entrench a **newly created** right, one **conferred on Aboriginal peoples by the Federal and Provincial governments**. Some language in the proposals suggests that the right is inherent, while other language appears to imply a created right. For example, the word "recognize" in the phrase "... in order to recognize Aboriginal peoples' autonomy ..." suggests that the right already exists, whereas the use of the past tense in the proposed "Canada clause" to the effect "... that the Aboriginal peoples **were** historically self-governing ..." implies that they are no longer self-governing peoples. Likewise, the proposal to "... **entrench** a general justiciable right to Aboriginal self-government ..." suggests that the right is not currently included in Section 35 of the *Constitution Act, 1982*, a position which is unacceptable to Aboriginal peoples.

Responding to the Federal proposals, the Assembly of First Nations articulated a view, shared by other Aboriginal peoples, that their right to self-government is an inherent right, flowing from their original occupation of the land:

Our Creator, Mother Earth, put First Nations on this land to care for and live in harmony with all her creation. We cared for our earth, our brothers and sisters in the animal world, and each other. These responsibilities give us our inherent, continuing right to self-government. This right flows from our original occupation of this land from time immemorial.⁵

A similar response came from the Native Council of Canada:

Part of the problem is the failure to see Aboriginal rights do not come from European documents or agreements or pieces of paper, although they may be acknowledged or recognized or defined on paper. Aboriginal rights are "inherent" in Aboriginal Peoples. They are inherited from our ancestors.⁶

Subsequently, the Right Honourable Joe Clark, the Federal Minister responsible for Constitutional Affairs, explained why the Government of Canada was reluctant to recognize the "inherent right to self-government" of Aboriginal peoples in the Constitution.

Our concern with that term is straightforward. *We believe that the word – undefined or unmodified – could be used as the basis for a claim to international sovereignty or as the justification of a unilateral approach to deciding what laws did or did not apply to Aboriginal peoples.*

(...)

Our concern with inherency is not with the word but with the meaning. *If we can be shown that an amendment can be drafted to ensure that an inherent right does not mean a right to sovereignty or separation, or the unilateral determination of powers, we will look at that.* If Aboriginal Canadians can help define what inherency would mean in practical terms – in terms of authorities and jurisdictions and powers – in such a way that the integrity of this federation is not put in question, we could welcome that. *We are not opposed to inherency.*⁷ (emphasis added)

Aboriginal leaders do not share Mr. Clark's concerns. Most recently, Rosemarie Kuptana, President of the Inuit Tapirisat of Canada,

addressed the issue directly in remarks to the Special Joint Committee on a Renewed Canada.

"Inherent" does not connote a desire to separate from the Canada state. To the extent it is international, it is simply the international language of human rights. It is used in the preamble of the United Nation's *Covenant on Human Rights*. The word "inherent" connotes the notion of rights that can be recognized but not granted, rights that may be unlawfully violated but that can never be extinguished.⁸

And, in answering questions before the Special Joint Committee on a Renewed Canada in January of 1992, Yvon Dumont of the Metis National Council stated:

We want to make it very clear ... that the Metis saw themselves as nation-builders within Canada ... we wish to continue to be part of Canada. We are not seeking sovereignty from Canada, we are not seeking separation; we are seeking recognition within the Canadian confederation.⁹

At this point in time it appears that we may be heading toward a Catch-22 situation. On the one hand, the Federal government is reluctant to use the term "inherent" without any parameters, invoking "concerns ... about the precise meaning of the word."¹⁰ On the other hand, Aboriginal peoples want "inherent" in the Constitution before any negotiations aimed at defining the scope or limit of self-government begin. Nevertheless, from the statements quoted above, there appears to be room for fruitful discussion directed at settling an issue which, since 1987, has prevented the explicit recognition of Aboriginal self-government in the Constitution. The aim of this paper is to assist in clearing away some of the obstacles to a common understanding.

2. Avoiding an Impasse

◆ In this section we begin with a survey of the historical and legal background to the current debate and then turn to the task of clarifying some important concepts. We next identify certain essential features of any successful constitutional reform and continue with a discussion of some constitutional approaches that might be of assistance in the forthcoming negotiations.

A. The Historical and Legal Background

Aboriginal peoples maintain that constitutional renewal and national unity can be legitimately achieved only if the status of Aboriginal peoples is elaborated in the Constitution in a manner acceptable to them as well as to the Federal and Provincial governments. Given the practices of coercion and exclusion often found in the past, it is crucial that the Aboriginal peoples of Canada be treated as equal partners in Confederation, consenting freely to the fundamental principles making up the Constitution.¹¹ The Constitution must also reflect accurately the position of Aboriginal nations and their historical relations with the Crown.

When Europeans first came to the shores of North America, the continent was occupied

by a large number of sovereign and independent Aboriginal peoples with their own territories, laws, and forms of government. These nations entered into relations with incoming European nations on a basis of equality and mutual respect, an attitude that persisted long into the period of colonization. As late as 1873, the Ojibway spokesman, Mawedopenais, stated during negotiations with the Crown for Treaty Number Three:

We think it a great thing to meet you here. What we have heard yesterday, and as you represented yourself, you said the Queen sent you here, the way we understood you as a representative of the Queen. All this is our property where you have come This is what we think, that the Great Spirit has planted us on this ground where we are, as you were where you came from. We think where we are is our property. I will tell you what he said to us when he planted us here; the rules that we should follow – us Indians – He has given us rules that we should follow to govern us rightly.¹²

France and Great Britain dealt with the Aboriginal peoples of North America on a nation-to-nation basis and sought to secure their assistance as trading partners and military allies. As the Supreme Court of Canada observed in the *Sioui* case (1990):

The mother countries [Great Britain and France] did everything in their power to

secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations. The papers of Sir William Johnson ..., who was in charge of Indian affairs in British North America, demonstrate the recognition by Great Britain that nation-to-nation relations had to be conducted with the North American Indians.¹³

As their power and influence in North America grew, Great Britain and France increasingly claimed rights of suzerainty over their Aboriginal allies, while respecting their internal sovereignty and Territorial rights.¹⁴ This approach was continued by Great Britain after France was eliminated as a colonial rival. On October 7th, 1763, the British Crown issued a Proclamation which in many ways is the Magna Carta of Aboriginal rights. In a striking preamble, the Proclamation states:

As whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds; ...¹⁵

Thus, while the Royal Proclamation asserted suzerainty over Aboriginal peoples living "under Our Protection", it also recognized that these peoples were "Nations" connected with the Crown by way of treaty and alliance. Further, it provided that Aboriginal nations should not be molested in their possession of

any unceded lands, and stipulated that such lands could only be ceded to the Crown in public meetings called for that purpose. It prohibited colonial governments from granting away Aboriginal lands, and ordered settlers not to evade them. In effect, then, the Proclamation acknowledged the retained sovereignty of Aboriginal peoples under the Crown's protection, and adopted measures to secure and protect their Territorial rights. This arrangement is the historical basis of the enduring constitutional relationship between Aboriginal nations and the Crown and provides the source of the Crown's fiduciary duties to those nations.¹⁶

The *Sioui* case confirms this viewpoint. The Supreme Court of Canada quotes with approval the observations of the United States Supreme Court in *Worcester v. State of Georgia* regarding British policy in the mid-1700s:

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted; *she considered them as nations capable of maintaining the relations of peace and war, of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.*¹⁷

In the view of the Supreme Court of Canada, a similar policy was continued by Great Britain after the fall of New France:

The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. *It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.*¹⁸ (emphasis added)

The Inuit, the indigenous people of the Arctic, also trace their inherent right of self-government to ancient times. They live mainly in the Northwest Territories above the tree line and in Northern Quebec and Labrador. The Denbigh culture flourished in the Canadian North in 2400 B.C., followed by the Dorset and Thule cultures, the most recent dating from 1000 A.D. Inuit people share a common language, Inuktitut, and a tradition of fishing, gathering and hunting, most notably sea mammals and caribou, using common implements such as the kayak.¹⁹ Compared to the Aboriginal peoples of southern Canada, Inuit contact with non-Aboriginal people has been more limited and more recent. Many Inuit people continue to live off the land and sea, while others have joined the wage economy. Inuit today propose sophisticated approaches to governance, which integrate elements of their ancient cultures with the demands of participating in a modern nation-state.

Aboriginal peoples of mixed Indian and European parentage trace their right of self-government to historical roots as well. Large numbers of Metis resided in the Red River Valley of Assiniboia, located in modern Manitoba. From the early 1800s to 1870 they farmed, trapped, traded, and developed common customs and folkways. By the end of this period, they had coalesced into a distinct nation, with a provisional government under Louis Riel. These Metis identify their homeland as a geographic area in western Canada. Other Aboriginal peoples of mixed parentage live elsewhere in Canada, and trace their origins to various Aboriginal nations.

The right of Aboriginal self-government, exercised by Aboriginal peoples with diverse

historical experiences, and acknowledged by the Crown in the Proclamation of 1763 and elsewhere, has never been relinquished. However, after the enactment of the *Indian Act* and various laws of general application, the right to self-government was severely curtailed without Aboriginal consent, giving rise to many of the difficulties experienced in relations between Aboriginal nations and Canada.

This trend was reversed in 1982 with the passage of the *Constitution Act, 1982* and the recognition of existing Aboriginal and treaty rights in Section 35. As the Supreme Court of Canada held in the landmark *Sparrow* decision of 1990, this Section gives constitutional recognition to Aboriginal and treaty rights that had not been extinguished prior to 1982 and protects them against unwarranted invasion and restriction.²⁰ In the Court's view, the fact that an Aboriginal right was tightly regulated prior to 1982 does not mean that it was extinguished, unless the legislation exhibited a clear and plain intention to extinguish. So, while the Supreme Court of Canada has not yet ruled specifically that a right of Aboriginal self-government is already entrenched in Section 35 of the Constitution, there is good reason to think that the Court would so rule.

It is interesting to compare the Canadian position with that prevailing in the United States of America. There, an inherent right of Aboriginal self-government has been recognized for over 160 years.²¹ In recent times, the nation-to-nation relationship between the Federal government and Aboriginal governments has been endorsed by Presidents Nixon, Carter, Ford, Reagan, and Bush. To quote President George Bush:

On January 24, 1983, the Reagan-Bush Administration issued a statement on Indian policy recognizing and reaffirming a government-to-government relationship between Indian tribes and the Federal Government. This relationship is the cornerstone of the Bush-Quayle Administration's policy of fostering tribal self-government and self-determination. ... This government-to-government relationship is the result of sovereign and independent tribal governments being incorporated into the fabric of our Nation, of Indian tribes becoming what our courts have come to refer to as quasi-sovereign domestic dependent nations. Over the years the relationship has flourished, grown, and evolved into a vibrant partnership in which over 500 tribal governments stand shoulder to shoulder with the other government units that form our Republic.²²

Tribal governments in the United States have limits placed on their right of self-government by treaty, by Federal law, and by their status as protected nations. This status precludes them from entering into treaties with other nations and from asserting criminal jurisdiction over non-Indians. Apart from this, however, the tribal governments have civil jurisdiction over a number of areas, including marriage, divorce, child welfare, estates, taxation, licensing, real property, and commercial transactions.²³ They maintain law and order and administer criminal justice within their territories, subject to specific statutory limitations. They also have the power to determine their own membership.²⁴ While the United States model falls short of the benchmark for successful reform in Canada, in particular by failing to provide for constitutional entrenchment, it nevertheless furnishes an interesting example of how the position of Aboriginal nations has evolved in a neighbouring country.

The rights of Aboriginal peoples have also received recognition in international law – a second root, one might say. Most recently the United Nations Working Group on Indigenous Populations has been engaged in drawing up a universal declaration on the rights of indigenous peoples. The draft declaration reads in part:

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in a spirit of coexistence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.²⁵

Against this historical and legal background, we now turn to the task of clarifying certain concepts that are crucial to understanding the current constitutional discussions.

B. Clarifying Some Concepts

In assessing proposals to recognize explicitly the right of Aboriginal self-government in the Constitution, it is helpful to distinguish three separate issues, which can easily be confused. These issues are: 1) the **source** of the right of self-government; 2) the **scope** or **extent** of the right; and 3) the **status** of the right.

With respect to the **source** of the right, it may be asked whether the Federal proposals treat the right as *created* or *inherent*. In the former case, the right is portrayed as the creation of the constitutional provision, which confers it on Aboriginal peoples. Without constitutional recognition, the right of self-

government would not exist. By contrast, if the right is inherent, it is viewed as originating, not from the constitutional provision, but from sources within the Aboriginal nations. On this view, the constitutional provision serves to recognize, delimit, and protect the right rather than create it.

As to the question of **scope**, is the proposed right of self-government presented as *circumscribed* or *uncircumscribed*? In the former case, there are distinct constitutional limits to the powers that Aboriginal governments may exercise, similar to those that curtail the powers of the Federal and Provincial governments under Sections 91-95 of the *Constitution Act, 1867*. In the latter case, if the right is uncircumscribed, Aboriginal governments would be competent to legislate in relation to any subject-matter they wish, including international relations, defence, and external trade.

With respect to the question of **status**, is the proposed right of self-government portrayed as *subordinate* to the powers of other governments or is it *sovereign* within its sphere? In the first case, Aboriginal governments are subservient to the Federal Parliament or the Provincial legislatures, so that laws enacted by an Aboriginal government are always liable to be overridden by Federal or Provincial laws. Given a conflict, for example, between a Federal law and an Aboriginal law, the Federal law will always prevail. By contrast, in the second case, an Aboriginal government has the power to legislate within a certain sphere without the possibility of being overruled by any other level of government, whether Federal or Provincial. This status is comparable to that held by Provincial legislatures vis-à-vis Parliament, and vice versa.

It is important to note that these three issues are independent of one another, so that the response to one does not necessarily determine the response to the others. In particular, the fact that a right is inherent in origins does not necessarily mean that it is unlimited in extent. These are distinct questions. Thus, for example, in the United States, Indian governments were declared by the Supreme Court to hold inherent powers of self-government, and yet to exercise those powers within certain limits, and indeed to be subordinate to the overriding power of Congress. As noted earlier, the subordinate status of Indian nations in the United States makes this model inappropriate for Canada. But the example illustrates the significant point that an inherent right of self-government does not necessarily carry with it unlimited powers.

C. Some Conditions for Successful Constitutional Reform

We are now equipped to identify a number of important criteria for successful constitutional reform, given the historical and legal background and the manner in which the constitutional discussions have evolved. The first three criteria respond to the three issues just identified, while the remainder deal with related concerns.

First, it is essential that the right of self-government be explicitly identified in the Constitution as *inherent* in nature. No other word can do justice to the fact that the right springs from sources within the Aboriginal nations, rather than from the written

Constitution. The distinction between the two conceptions is not merely technical. Neither is it a matter of shallow symbolism or window-dressing. It goes to the very foundation of our understanding of how Canada emerged and what it stands for. According to one view, Aboriginal peoples have no rights of government except those that the Federal and Provincial governments are prepared to bestow upon them; according to the other, Aboriginal peoples are the heirs to ancient and enduring powers of government that they brought with them into Confederation and still retain today. Under the first view, Aboriginal governments are recent arrivals on the constitutional scene, mere fledglings among the other governments in Canada. Under the other view, Aboriginal governments provide the Constitution with its

deepest and most resilient roots in the original traditions of this land.

Beyond this, the term “inherent” has important practical implications. By clearly identifying the source and nature of the right, it gives courts and other interested parties a strong mandate to implement the right and significant guidance on how to interpret it. The term indicates that the right does not consist of something “granted” by the Federal and Provincial governments; as such it minimizes the significance of governmental intentions as a guide to interpretation. It also highlights the fact that the right of self-government should be understood in the light of the living cultures and traditions of Aboriginal peoples, as well as their contemporary outlooks. Since these traditions are

DIAGRAM I

Created Right

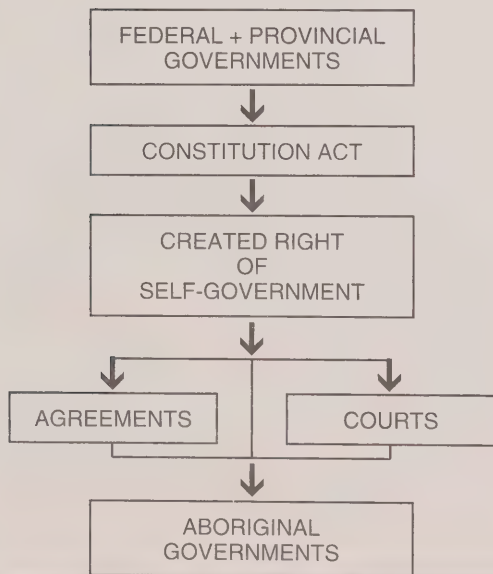
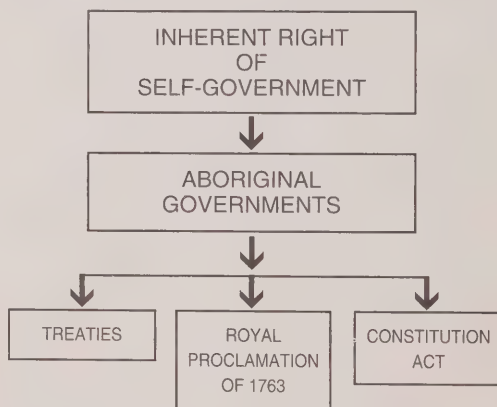


DIAGRAM II

Inherent Right



multiple and diverse, the right may well assume different shapes in the various Aboriginal nations.

The point is illustrated by the two diagrams on page 12. Diagram I shows self-government as a created right flowing entirely from the Constitution, which in turn is the creature of the Federal and Provincial governments. Diagram II shows self-government as an inherent right, which gives rise directly to Aboriginal governments. This right is recognized in such written documents as treaties, the Royal Proclamation of 1763, and the Constitution, but the latter are not the source of the right, which lies within the Aboriginal nations.

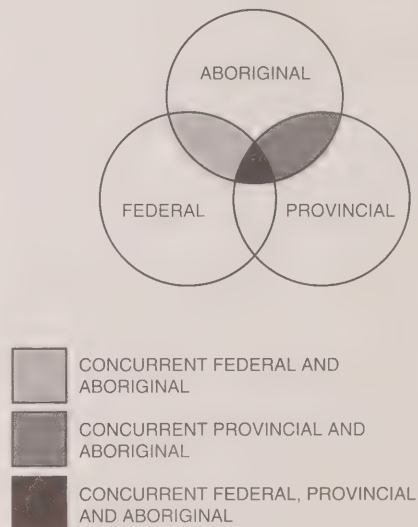
The second criterion for successful constitutional reform relates to the scope of the inherent right of self-government. The right should be described in such a way as to make it clear that it is *circumscribed* rather than *uncircumscribed* in its extent; as such it recognizes Aboriginal governments as co-existing under the Constitution with Federal and Provincial governments, which also hold limited powers. If it were not circumscribed, Aboriginal governments would possess unlimited competence in all subject areas, including defence and international affairs. None of the national Aboriginal organizations has advocated such a course.

Third, within a certain constitutional sphere, the powers of Aboriginal governments should be *sovereign*, so that Aboriginal laws will take precedence over Federal and Provincial laws. In other spheres, Federal or Provincial laws will take precedence. Some areas of jurisdiction will be exclusive to Aboriginal governments, while others will be shared. The

resulting pattern of exclusive and overlapping spheres or jurisdiction is, of course, a familiar feature of the existing federal system in Canada.

Diagram III illustrates one possible version of such an arrangement. The three circles represent the jurisdictional spheres of Aboriginal, Federal, and Provincial governments respectively. It can be seen that one portion of the Aboriginal sphere is an area of exclusive Aboriginal jurisdiction, while other portions are shared with the Federal government, the Provincial governments, or with both.

DIAGRAM III



Fourth, constitutional reform should not proceed in this area without the full involvement and *consent* of the Aboriginal peoples. In particular, any provision designed to reflect the circumscribed scope of the right of self-government must receive their complete adherence. The history of Canada has exhibited many regrettable instances in which measures adversely affecting the basic powers and rights of Aboriginal nations have been taken not only without their consent but without their participation, and indeed against their expressed wishes. This high-handed, unilateral approach is out of keeping with the basic constitutional relationship between Aboriginal nations and the Crown and departs from the consensual approach reflected, however imperfectly, in the numerous treaties concluded between Aboriginal nations and the Crown.

Fifth, any provision explicitly recognizing the inherent right of self-government should be *consistent* with the view that this right may already be entrenched in Section 35 of the *Constitution Act, 1982*. In other words, it should serve to enhance the rights already recognized there rather than diminish them. As seen earlier, decisions of the Supreme Court of Canada lend strong support to the view that the right of self-government is a right that continued to exist even after the Crown asserted suzerainty, and, although constricted by the *Indian Act* and other measures, has never been extinguished. As such it may well number among the existing rights recognized and affirmed in Section 35 and enjoy protection from unwarranted invasion by the Federal and Provincial governments. Any new constitutional initiative should be

designed to support rather than undermine this interpretation.

Finally, it is essential that any new provision be *justiciable* as soon as it is passed, without any "transition period", though self-government agreements obviously will be the normal and desirable vehicle for implementing the right of self-government. This criterion follows directly from points already made. If the right of self-government is identified in the Constitution as inherent in its nature and origins, it is hard to see how its recognition in the courts can be delayed. For, on this view, the right preceded the constitutional provision and exists quite apart from it. In addition, as just noted, Section 35 of the *Constitution Act, 1982* arguably already includes a right of self-government. To insert a new provision delaying the justiciability of the right would not only offer less than what the Constitution may already provide, but also it would contrive to suggest that Section 35 did not previously contain such a right.

In summary, then, we feel that any new constitutional provision dealing with the Aboriginal right of self-government should satisfy six criteria. It should indicate that the right is *inherent* in nature, *circumscribed* in extent, and *sovereign* within its sphere. The provision should be adopted with the *consent* of the Aboriginal peoples, and should be *consistent* with the view that Section 35 may already recognize a right of self-government. Finally, it should be *justiciable* immediately.

With these criteria in hand, we can now turn our attention to identifying some possible approaches to constitutional reform that might be of assistance to the parties.

D. Exploring Alternative Approaches

It has been noted that the Federal government, between 1987 and 1991, changed its approach to the constitutional negotiations: it now seems ready to recognize explicitly the right of self-government in the Constitution, prior to any negotiation on its scope. But this change has brought to the forefront the delicate question of the nature of the right, giving rise to concerns over its international reach and relationship to Federal and Provincial powers. Set out below are some examples of approaches that attempt to allay these concerns while satisfying the Aboriginal peoples' call for the explicit recognition of an inherent right of self-government.

It should be emphasized that these approaches are offered merely as illustrations. We do not suggest that they are necessarily the best or only methods of clearing away the obstacles to fruitful constitutional negotiations. They are presented to give concrete dimensions to the six criteria just identified, and to stimulate thought on ways of bridging the gap between the concerns of the Federal and Provincial governments and the aspirations of Aboriginal nations. We reiterate the point that the consent of the Aboriginal peoples is an essential ingredient in the process. In offering these examples, we hope only to smooth the path to further exchanges between the parties, not to usurp their rightful place at the negotiating table.

Approach One: A General Recognition Clause

The cornerstone of any constitutional reform must be a general clause that explicitly

identifies the right of Aboriginal self-government as a constitutional right. It is anticipated that the Constitution would provide that Aboriginal self-government will be implemented through negotiated agreements with Federal and Provincial governments and impose an obligation to negotiate. Nevertheless, resort to the courts would be available immediately to Aboriginal peoples. One possible approach would be to adopt a general amendment along the following lines, which adds a new Subsection (5) to the existing Section 35 of the *Constitution Act, 1982*:

35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

...

- (5) For greater certainty, Subsection (1) includes the *inherent* right of self-government. (emphasis added)

This approach has the merit of great simplicity; yet it also strikes a subtle balance among the diverse concerns identified above. The first concern is satisfied by the word "inherent", which indicates that the right of self-government is not a created right but flows from sources within the Aboriginal nations. The text also identifies the right of self-government as one of the rights recognized in Subsection 35(1), with the wording allowing for the possibility that it is either an Aboriginal right or a treaty right or both. As such, the text satisfies the fifth concern identified above; consistency with the view that Section 35 already harbours a right of self-government.

As a Section 35 right, the right of self-government would benefit from the rulings of

the Supreme Court in the *Sparrow* case.²⁶ According to that case, Section 35 rights are constitutionally entrenched and enjoy freedom from Federal and Provincial interference, except where the latter can be justified under stringent criteria. Thus the right of Aboriginal self-government would take precedence over Federal and Provincial laws in relation to all subjects falling properly within its scope. It would thus be sovereign within its sphere, under our third criterion.

At the same time, the right of self-government would not be an unlimited right but would be circumscribed in scope, thus fulfilling our second criterion. It is clear that the right would operate within the broad framework of the Constitution of Canada. This conclusion flows from the simple fact that the right is embodied in a provision of the Canadian Constitution rather than an international instrument. It is also supported by the fact that the right is identified as pertaining to "the Aboriginal peoples of Canada" under the existing wording of Subsection 35(1). The reference to "Canada" plainly counters any suggestion that the provision confers international status. Further, as the Supreme Court of Canada held in the *Sparrow* case, while Aboriginal rights have priority within certain spheres, there are also areas where Federal and Provincial laws take precedence. So, Aboriginal governments stand alongside Federal and Provincial institutions under the Canadian Constitution, with their scope circumscribed by their co-existence under the Constitution and by the essential features of membership in the Canadian state.

Finally, the right of self-government identified in Subsection 35(5) would be

justiciable immediately, without a transition period, though Constitutionally-mandated negotiations on self-government agreements will be the normal and desirable vehicle for implementing the right of self-government.

Should there be concerns that Subsection 35(5), as worded above, might be read to support Aboriginal self-government with an uncircumscribed scope, or support claims to international personality, the provision could be altered slightly, as follows:

- (5) For greater certainty, Subsection (1) includes the *inherent* right of self-government *within Canada*.
(emphasis added)

As it stands, the text does not make any reference to the *Canadian Charter of Rights and Freedoms* or attempt to resolve the question of its application to the right of self-government. This complex issue lies outside the scope of this commentary, which is primarily concerned with the concept of inherency.

Approach Two: A General Recognition Clause with a Preamble

Section 35 of the *Constitution Act, 1982* is located in Part II of the Act, entitled "Rights of the Aboriginal peoples of Canada". This Part currently has no preamble. By contrast, the *Canadian Charter of Rights and Freedoms*, which is found in Part I of the *Constitution Act, 1982* begins with this preamble:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

It is worth considering whether Part II should be provided with a similar preamble, which

would directly precede Section 35 but apply to the entire Part. The text would then contain both a recognition clause and a preamble, and might read as follows:

Whereas the Aboriginal peoples of Canada are the First Peoples of this country, holding *inherent* rights, powers, and responsibilities under God:

35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

...

(5) For greater certainty, Subsection (1) includes the right of self-government *within Canada*. (emphasis added)

This approach has the advantage of raising Part II as a whole in stature and dignity. It clearly identifies Aboriginal peoples as the First Peoples of Canada and links their special rights to that unique status. Traditional Aboriginal philosophical outlooks are also reflected in the preamble.

In the text given above, the word “inherent” is found in the preamble but not in Subsection (5).

Approach Three: A General Recognition Clause with a List of Powers

Within the context of a general recognition clause, as discussed in the first two approaches, it might be useful to include a list of subjects in relation to which the right of self-government can be exercised. Since it may well prove to be difficult to reach agreement on the contents of a complete list, a partial list of heads of power could be inserted with the

aim of illustrating the range of powers available to Aboriginal governments, without providing an exhaustive account. Under this approach, the wording of Section 35 might then read as follows:

35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

...

(5) For greater certainty, Subsection (1) includes the *inherent* right of self-government in relation to certain classes of subjects, including:

- (a) lands and resources
- (b) language and culture
- (c) education
- (d) policing and the administration of justice
- (e) health
- (f) social and economic development
- (g) [etc., etc.]

This approach has some important advantages. It provides a common baseline from which discussions about implementing self-government can proceed. It also gives some concrete guidance to courts in interpreting Subsection 35(5) and helps to ensure that certain subjects will not be excluded from Aboriginal jurisdiction by narrow judicial interpretations. At the same time, by using the word “including”, the text allows for the possibility that Aboriginal governments may assume powers in areas beyond those listed,

and it permits a natural evolution in the relations between Aboriginal nations and the Crown.

**Approach Four:
A General Recognition Clause
with a Treaty Process**

Another approach, recently put forward by Premier Joseph Ghiz of Prince Edward Island, suggests that, in addition to a constitutional amendment recognizing the inherent right of self-government, a National Treaty of Reconciliation should be concluded between Aboriginal nations and the Federal and Provincial Governments.

This National Treaty could provide a context for dealing with the legal ramifications of recognizing an inherent right as the basis for self-government.²⁷

It would "... serve as the vehicle to move from the recognition of inherent right to actual negotiated agreements on self-government."²⁸

The treaty process, linked to an inherent right of Aboriginal self-government in the Constitution, would provide a method for defining the meaning of self-government in practice. It would set parameters and guidelines for subsequent negotiations, while at the same time allowing for flexibility, experimentation and growth. Premier Ghiz envisages that the National Treaty would deal with a range of issues, including land, culture and language. Under it, Aboriginal governments would exercise both exclusive and shared jurisdictions.

The treaty approach is attractive on several counts. The process clearly involves Aboriginal consent. A treaty, once signed,

would be constitutionally entrenched under Section 35 of the Constitution. Treaties have been the traditional instruments structuring relations between Aboriginal peoples and the Crown. The treaty concept is therefore familiar to Canadians, and it holds deep symbolic significance for many Aboriginal people. A National Treaty of Reconciliation would be a source of national pride. Further, a National Treaty, implemented regionally and locally through specific agreements, could accommodate the diversity among Aboriginal peoples across Canada. Thus, as a means of renewing the relationship between Aboriginal peoples and Canadians in general, a National Treaty of Reconciliation has some appeal.

However, a National Treaty may also have some disadvantages. It involves the insertion of a further step into the process of implementing self-government, namely the negotiation of the terms of the umbrella agreement. If the Treaty is intended to cover a wide range of substantive issues, it may well give rise to controversy and dissent, and involve major delays in an already long-overdue process. Of course, if the National Treaty is more symbolic in nature, this problem may not arise.

Section 35, as it stands, already envisages a treaty process. It thus provides an excellent vehicle for implementing both a National Treaty and also more particular self-government agreements. However, to facilitate the process, it might be advisable to add a new Subsection (6) to Section 35, as follows:

35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.


...

-
- (5) For greater certainty, Subsection (1) includes the *inherent* right of self-government within Canada.
- (6) For greater certainty, Subsection (1) “existing ... treaty rights” includes rights under *existing or future treaties, including self-government agreements (so identified by parties to the self-government agreement)*. (emphasis added)

It will be noted that the given text does not lay down any particular procedure for the conclusion of treaties and self-government agreements, or indicate which governments must be party to the process. The intention is to leave unchanged the existing constitutional process for concluding treaties with Aboriginal peoples. The phrase “existing or future” is used to rule out the possibility that Subsection 35(1) might otherwise be interpreted as covering only treaties existing at the time the Subsection was enacted.

Self-government agreements concluded under Subsection 35(6) would automatically enjoy the same status and protection as other treaty rights covered by Subsection 35(1), and would thus be constitutionally entrenched.

Conclusion

 In varied consultations, Canadians have expressed the will to achieve a lasting reconciliation with Aboriginal peoples and to recognize them as equal partners in Confederation. The current round of constitutional negotiations presents a unique opportunity to place the long-standing relationships between Aboriginal peoples and Canada on a new and mutually respectful footing. In preparing this commentary, we have been motivated by the concern that, without the identification of points of convergence among the parties, the experience of 1987 could be repeated, when participants walked away from the table with shattered hopes.

We urge all parties to seize this moment and recreate the spirit of co-existence and reciprocity that characterized early relations between Aboriginal peoples and incoming settlers. It is time for Canadians to respond in kind to the generosity and good will shown by the Ojibway spokesman, Mawedopenais, when he said to the Crown's representatives in 1873: "We think it a great thing to meet you here".²⁹

Endnotes

1. Minute of a Meeting of the Committee of the Privy Council, P.C. 1991-1597, August 26, 1992, p. 2: "the Commissioners be authorized to commission and publish special studies or commentaries as may be appropriate from time to time;" Schedule II (1) (d): "The Terms of Reference for the Royal Commission contain a provision authorizing the release of interim reports. The Commission might find this mechanism particularly appropriate if its recommendations on certain topics would be useful in other public policy fora such as the constitutional reform processes."
2. Minister of Supply and Services Canada, 1991.
3. Assembly of First Nations, Native Council of Canada, Metis National Council, Inuit Committee on National Issues, "Joint Aboriginal Proposal for Self-Government", First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, March 27, 1987 CICS Document 800-23/030. In this proposal, negotiations would be initiated at the request of Aboriginal Peoples, and would include: self-government, lands, resources, economic and fiscal arrangements, education, preservation and enhancement of language and culture, and equity of access to Indian, Metis and Inuit persons. The rights defined in the agreements would be protected in the Constitution as are treaty rights.
4. Minister of Supply of Services Canada, p. 7 (emphasis in original).
5. Assembly of First Nations First Circle on the Constitution, *First Nations and the Constitution: Discussion Paper*, November 21, 1991, p. 8.
6. Native Council of Canada, "Towards a New Covenant", Ottawa, January 27, 1992.
7. The Right Honourable Joe Clark, Minister Responsible for Constitutional Affairs, Notes for a speech to the Native Council of Canada, Hull, Quebec, November 7, 1991, p. 6.
8. Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada, Issue No. 37, January 9, 1992, p. 37:12.
9. Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada, Issue No. 36, January 9, 1992, p. 36:41.
10. The Right Honourable Joe Clark, Minister responsible for Constitutional Affairs, Notes for a Speech to the All chiefs Constitutional Assembly of the Assembly of First Nations, Ottawa, November 27, 1991, p. 4.
11. As the Supreme Court of Canada stated in *Re Manitoba Language Rights*, [1985] 1 S.R.C. 721 at p. 745: "The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental ...".
12. Hon. Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North West Territories* (Toronto: 1880) at p. 59; quoted in Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada", (1984) Vol. 32 *American Journal of Comparative Law* 361, at p. 376.

13. *R. v. Sioui* [1990] 1 S.C.R. 1025, at p. 1053. Justice Lamer (now Chief Justice) delivered the unanimous opinion of the Court.
14. See Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (Doctoral Dissertation, Oxford University, 1979; published by the University of Saskatchewan Native Law Centre, 1979); John D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Doctoral Dissertation, Cambridge University, 1985; published by the University of Saskatchewan Native Law Centre, 1985).
15. The most authoritative printed text of the Proclamation is found in Clarence S. Brigham, ed., *British Royal Proclamations Relating to America*, Vol. 12, *Transactions and Collections of the American Antiquarian Society* (Worcester, Mass.: 1911), pp. 212-18.
16. On the Crown's fiduciary responsibilities, see the following decisions of the Supreme Court of Canada: *Guerin v. The Queen* [1984] 2 S.C.R. 335 (especially the opinions of Justice Dickson and Justice Wilson); and *R. v. Sparrow* [1990] 1 S.C.R. 1075. It should be noted that in the *Sparrow* decision, the Court determined that the fiduciary relationship extended to all Aboriginal peoples, including Indian, Inuit and Metis peoples.
17. Quoted in *Sioui*, *supra* endnote 13, at p. 1054. The emphasis is found in the *Sioui* judgment.
18. *Ibid.*, at p. 1055, emphasis added.
19. See Kenneth Coates, *Canada's Colonies: A History of the Yukon and Northwest Territories* (Toronto: James Lorimer and Company, 1985), pp. 27-30.
20. *R. v. Sparrow* [1990] 1 S.C.R. 1075. Chief Justice Dickson and Justice Laforest jointly wrote the Court's unanimous opinion.
21. Notably in the judgments of Chief Justice Marshall of the United States Supreme Court. *Johnson and Graham's Lessee v. McIntosh* (1823), 21 US (8 Wheaton) 543; *Worcester v. The State of Georgia* (1832), 31 US (6 Peters) 515; and *Cherokee Nation v. Georgia* (1831) 30 US (5 Peters) 16, 20.
22. Statement by President George Bush of June 14, 1991 on American Indian Policy.
23. Cohen, *Handbook of Federal Indian Law*, (Richie Bobbs-Merrill, 1982), pp. 249-250.
24. See Douglas Sanders, *Aboriginal Self-Government in the United States* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985), pp. 53-59.
25. Operative paragraph 1, p. 32, E/CN.4/Sub.2/1991/40/Rev.1.
- 26.. Referred to above, at footnote 20.
27. Remarks by Premier Joseph Ghiz, "Aboriginal Self-Government and the Canadian Constitution", Faculty of Law, University of Ottawa, January 14, 1992, p. 13.
28. *Ibid.*, p. 16.
29. Quoted above, at footnote 12.

Appendix
Order in Council and
Terms of Reference of the
Royal Commission

P.C. 1991-1597



PRIVY COUNCIL

Certified to be a true copy of a Minute of a Meeting of the Committee of the
Privy Council, approved by His Excellency the Governor General
on the 26th day of August, 1991

The Committee of the Privy Council, on the recommendation of the Prime Minister, advise that a Commission do issue under Part I of the Inquiries Act and under the Great Seal of Canada appointing:

- (a) the Honourable Allan Blakeney of Saskatoon, Saskatchewan
- (b) Paul Chartrand of Winnipeg, Manitoba
- (c) the Honourable René Dussault of Sillery, Quebec
- (d) Georges Erasmus of Yellowknife, Northwest Territories
- (e) Viola Robinson of Tatamagouche, Nova Scotia
- (f) Mary Sillett of Happy Valley-Goose Bay, Labrador, and
- (g) the Honourable Bertha Wilson of Ottawa, Ontario

to inquire into and report upon the matters set out in pages 10 to 18 of the report dated August 2, 1991 to the Prime Minister from the Right Honourable Brian Dickson attached hereto as Schedule I, and

The Committee do further advise that:

- (1) pursuant to section 56 of the Judges Act, the Honourable René Dussault, be authorized to act as a Commissioner in the inquiry;
- (2) the Commissioners be authorized to adopt such procedures and methods as they may consider expedient for the proper conduct of the inquiry and to sit at such times and in such places as they may decide, especially in aboriginal communities across Canada;

...2

- 2 -

- (3) the Commissioners be authorized to create regional or issue-specific task forces or advisory bodies as they deem appropriate to assist them in the examination of any aspect of their terms of reference;
- (4) the Commissioners be authorized to commission and publish special studies or commentaries as may be appropriate from time to time;
- (5) the Commissioners be authorized to invite an aboriginal person selected by his or her community to sit as a special advisor to the Commission, without remuneration, for days on which the Commission chooses to sit in an aboriginal community;
- (6) the Commissioners be authorized to rent such space and facilities as may be required for the purposes of the inquiry, in accordance with Treasury Board policies;
- (7) the Commissioners be authorized to engage the services of such experts and other persons as are referred to in section 11 of the Inquiries Act, at such rates of remuneration and reimbursement as may be approved by the Treasury Board;
- (8) the Commissioners be directed to govern their inquiry by the considerations set out in pages 24 to 26 of the report to the Prime Minister from the Right Honourable Brian Dickson attached hereto as Schedule II;
- (9) the Commissioners be authorized to submit interim reports on specific issues as they deem necessary to the Governor in Council in both official languages;
- (10) the Commissioners be directed to submit a final report to the Governor in Council in both official languages with all reasonable dispatch;

...3

- 3

- (11) the Commissioners be directed to file the records and papers of the inquiry as soon as reasonably may be after the conclusion of the inquiry with the Clerk of the Privy Council; and

The Committee do further advise that the inquiry be known as the Royal Commission on Aboriginal Peoples, that the Honourable René Dussault and Georges Erasmus be Chairpersons of the Commission, and that Jean T. Fournier of Ottawa, Ontario be appointed Executive Director of the Commission.

CERTIFIED TO BE A TRUE COPY - COPIÉ CERTIFIÉ CONFORME



CLERK OF THE PRIVY COUNCIL - LE GREFFIER DU CONSEIL PRIVE

Schedule I

Terms of Reference

"The Commission of Inquiry should investigate the evolution of the relationship among aboriginal peoples (Indian, Inuit and Metis), the Canadian government, and Canadian society as a whole. It should propose specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships and which confront aboriginal peoples today. The Commission should examine all issues which it deems to be relevant to any or all of the aboriginal peoples of Canada, and in particular, should investigate and make concrete recommendations concerning:

1. The history of relations between aboriginal peoples, the Canadian government and Canadian society as a whole.

This investigation may include studies of historical patterns of aboriginal settlement and governance, the Royal Proclamation of 1763, the development and interpretation of pre- and post-confederation aboriginal treaties, the evolution of political arrangements in the North, and social tensions which have characterized the relationship between aboriginal and other Canadian communities. Building upon this historical analysis, the Commission may make recommendations promoting reconciliation between aboriginal peoples and Canadian society as a whole, and may suggest means by which aboriginal spirituality, history and ceremony can be

better integrated into the public and ceremonial life of the country.

2. The recognition and affirmation of aboriginal self-government; its origins, content and a strategy for progressive implementation.

The Commission's investigation of self-government may focus upon the political relationship between aboriginal peoples and the Canadian state. Although self-government is a complex concept, with many variations, the essential task is to break the pattern of paternalism which has characterized the relationship between aboriginal peoples and the Canadian government. The Commission should review models of self-government which have been developed in Canada and around the world, and should make recommendations concerning fiscal arrangements and economic development initiatives necessary for successful transitions to self-government. The scope, effect and future elaboration of ss. 25 and 35 of the *Constitution Act, 1982* may be evaluated.

3. The land base for aboriginal peoples, including the process for resolving comprehensive and specific claims, whether rooted in Canadian constitutional instruments, treaties or in aboriginal title.

The Commission may investigate and explain the deep spiritual and cultural ties which bind

aboriginal peoples to the land, the relationship between an adequate land base and economic development, and the importance of environmental protection. It may also outline appropriate processes for the settlement of outstanding comprehensive and specific claims. The scope, effect and future elaboration of ss. 25 and 35 of the *Constitution Act, 1982* may be evaluated in relation to the land base as well as to self-government.

4. The historical interpretation and application, and potential future scope, of s. 91(24) of the *Constitution Act, 1867* and the responsibilities of the Canadian Crown.

An investigation of s. 91(24) may include examination of the internal political organization of aboriginal communities, the obligations of the federal Crown towards aboriginal people, the representation of aboriginal people in Canadian political institutions, and the relationship and potential for conflict between s. 91(24) and aboriginal notions of law and the legal process.

5. The legal status, implementation and future evolution of aboriginal treaties, including modern-day agreements.

An investigation of the historic practices of treaty-making may be undertaken by the Commission, as well as an analysis of treaty implementation and interpretation. The Commission may also want to consider mechanisms to ensure that all treaties are honoured in the future.

6. The constitutional and legal position of the Metis and off-reserve Indians.

The Commission may examine legislative jurisdiction concerning the Metis and Non-

Status Indians, and investigate the economic base of, and the provision of government services to, these people and to off-reserve and urban Indians.

7. The special difficulties of aboriginal people who live in the North.

The Commission may investigate the difficulties and costs of communications and transport, issues of environmental protection, sustainable economic and social development, access to natural resources, and any differential treatment of northern aboriginal people by the Canadian and Territorial Governments.

8. The *Indian Act* and the role, responsibilities and policies of the Department of Indian Affairs and Northern Development (DIAND).

The Commission may investigate in particular the legislative scheme of the *Indian Act*, the relationship between that scheme and the evolving policies of DIAND, the theory or aboriginal-government relations implicit in the *Indian Act*, and the future of the *Act* and of DIAND. All of these could be examined to determine whether existing federal legislation and administrative practices are consistent with evolving theories of Canadian law, including aboriginal and treaty rights.

9. Social issues of concern to aboriginal peoples.

In particular, the Commission may study and make concrete recommendations to improve the quality of life for aboriginal peoples living on reserve, in native settlements and communities, and in rural areas and cities. Issues of concern include, but are not limited to:

poverty, unemployment and underemployment, access to health care and health concerns generally, alcohol and substance abuse, sub-standard housing, high suicide rates, child care, child welfare, and family violence.

10. Economic issues of concern to aboriginal peoples.

The Commission may investigate the problems of developing a viable economic base for aboriginal peoples, unemployment, access to labour markets, discrimination in employment, taxation and custom duties.

11. Cultural issues of concern to aboriginal peoples.

In particular, the Commission may investigate the protection and promotion of aboriginal languages, recognition by Canadian society and institutions of the intrinsic value of aboriginal spirituality, recognition by Canadian society and institutions of the intrinsic value of aboriginal family structures and child care patterns, and the protection of traditional hunting, fishing and trapping ways of life.

12. The position and role of aboriginal elders.

The Commission may examine the social and economic conditions of elders as a group, their traditional role in aboriginal societies and whether existing laws and governmental practices respect and accommodate that role, and the continuing role for elders in aboriginal societies.

13. The position and role of aboriginal women under existing social conditions and legal arrangements, and in the future.

The Commission may examine, in particular, issues related to financial and property provisions upon divorce, access to the labour market, definitions of membership in aboriginal groups, and the role of native women in political institutions in their own communities and in non-native society.


14. The situation of aboriginal youth.

The Commission may investigate access to education, access to community leisure and sports facilities, alcohol and substance abuse, suicide amongst youth, and funding for youth programmes. The Commission may also focus upon means of enhancing and promoting a positive self-image in aboriginal youth, especially in the way they view the relationship between their historical and cultural roots and contemporary educational institutions.

15. Educational issues of concern to aboriginal peoples.

In particular, the Commission may investigate aboriginal control over primary and secondary education on reserves and in native communities (including issues of funding), the promotion and protection of aboriginal cultural identity in educational institutions (including institutions where aboriginal students are a minority group), the encouragement of aboriginal children to complete secondary education, and access to and funding for post-secondary education (including college, university and technical training).

16. Justice issues of concern to aboriginal peoples.



In particular, the Commission may investigate and make concrete recommendations concerning the relationships between aboriginal people and the police (with the policing function broadly conceived to include dispute resolution and community service), the promotion of respect for aboriginal people and culture within the justice system, techniques to aid aboriginal people in comprehending court processes especially through the provision of interpretation services, means to decrease the rate of incarceration of aboriginal offenders, methods to improve conditions of incarceration for aboriginal offenders, and the potential to elaborate aboriginal justice systems and to incorporate principles of aboriginal legal culture into the Canadian justice system.”

Schedule II

Matters for the Royal Commission

There was widespread agreement among the people with whom I consulted on the following points:

- (a) Although, in deference to the constitutional reform processes, I have tried to avoid framing "constitutional" Terms of Reference, it is inevitable that constitutional issues will arise under some of the Terms of Reference. There is a real potential for confusion, duplication, inefficiency and waste which needs to be avoided. In terms of timing, it is essential that the Commission which has much important work to do, some of which may touch on constitutional issues, provide any recommendations it may have on constitutional reform issues in a timely fashion.
- (b) The Royal Commission should consider travelling extensively to native communities throughout Canada. Native people do not want to be studied; rather they want to meet the Commissioners and tell their stories in person, preferably in the communities in which they live.
- (c) The Royal Commission may want to consider sitting in smaller panels (e.g., panels of two or three members for some of its hearings). This might permit wider public access to the Commission, encourage a deeper consideration of some issues, and save money.
- (d) The Terms of Reference for the Royal Commission contain a provision authorizing the release of interim reports. The Commission might find this mechanism particularly appropriate if its recommendations on certain topics would be useful in other public policy fora such as the constitutional reform processes.
- (e) The Royal Commission might want to consider the possibility of an advisory role for native elders. The position and role of elders are highly valued and honoured in most native communities. Elders might be able to assist the Commission in its communication with native communities and in its understanding of native traditions and values.
- (f) The Royal Commission should consider carefully the questions of timing and expense. Although Royal Commissions have played an important role in Canadian public life, the perception of many ordinary Canadians is that they move

slowly and cost a lot. The Commission must address these two issues creatively.

- (g) Perhaps most importantly, the Royal Commission should seriously try to identify and articulate solutions to current problems. Many of the problems are well-known and well-documented; further study would be superfluous and condescending. On the other hand, a Commission genuinely focused on trying to discover solutions to those problems would be a valuable enterprise indeed. I agree with Professor David Newhouse of the Department of Native Management at Trent University who wrote to me in these terms:

It is important that the Commission carry out its work with both a knowledge of the history of aboriginal people and our future goals and to use that knowledge to inform and guide its work. The Commission should not be another study of the problems facing aboriginal people, for these have been well documented in numerous reports, studies, and presentations. In addition, there have been many solutions proposed by a variety of individuals, groups and associations, both aboriginal and non-aboriginal. Some of these solutions are currently being tried within our communities with varying degrees of success. What is important at this time is that the Commission examine the various solutions, efforts and activities and point the way for Canadians to support the continued development of aboriginal communities.

